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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 SECURITIES and EXCHANGE  
4 COMMISSION,

5 Plaintiff,

6 New York, N.Y.

7 v.

8 23 CV 8072 (JGK)

9 VIRTU FINANCIAL, INC., et al.,

10 Defendants.

11 -----x Motion

12 August 9, 2024  
13 12:30 p.m.

14 Before:

15 HON. JOHN G. KOELTL,

16 District Judge

17 APPEARANCES

18 SECURITIES and EXCHANGE COMMISSION  
19 Attorneys for Plaintiffs  
BY: DAMON W. TAAFFE  
JAMES M. CARLSON

20  
21 PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP  
22 Attorneys for Defendants  
BY: LORIN . REISNER  
ANDREW G. GORDON  
JESSICA S. CAREY  
MEGAN VINCENT

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1 (Case called)

2 MR. TAAFFE: Good morning. Damon Taaffe for the  
3 Commission. With me is James Carlson, also with the  
4 Commission.

5 MR. REISNER: Good afternoon, your Honor. Lorin  
6 Reisner from Paul Weiss for Virtu. And I'm with my colleagues  
7 Megan Vincent, Andrew Gordon, and Jessica Carey.

8 THE COURT: Good afternoon, all.

9 I should point out at the outset that I know  
10 Mr. Reisner. We were colleagues together at Debevoise over 30  
11 years ago. Nothing about that affects anything that I do in  
12 the case.

13 This is a motion to dismiss by the defendants. I'll  
14 listen to argument.

15 MR. REISNER: Thank you, your Honor. I'd like to  
16 briefly review why all of the claims asserted in the amended  
17 complaint, those under Section 17(a) (2) and (a) (3) of the  
18 Securities Act, as well as those under Section 15(g) of the  
19 Exchange Act, should be dismissed.

20 THE COURT: There is no motion to dismiss Count Four,  
21 17(a) (3) against VAL.

22 MR. REISNER: That is correct, your Honor. All of the  
23 counts on which we have moved should be dismissed.

24 Let me start with the Section 17(a) (2) and (a) (3)  
25 claims. None of the statements that the SEC alleges were

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1 misleading are actionable as a matter of law for two  
2 fundamental reasons: First, the statements were true and  
3 accurate based on the allegations of the amended complaint, and  
4 documents referenced by and incorporated in the amended  
5 complaint that the Court may properly consider on this motion.

6 Those allegations and those documents demonstrate that  
7 Virtu had extensive written policies and procedures providing  
8 for prohibitions on the misuse of sensitive information,  
9 prohibitions on accessing non-permission data, physical  
10 information barriers, and logical information barriers.

11 For example, the VAL compliance manual referenced in  
12 paragraph 47 of the amended complaint and attached as Exhibit 1  
13 to our moving declaration provides that the firm has  
14 established information barrier processes that are intended to  
15 segregate information within discrete business units. The  
16 information barriers include both physical and systematic  
17 separation between business groups, so that the information  
18 processed by one business group is not shared with other  
19 business groups who do not have a need to know about the  
20 information.

21 The compliance manual further provides that employees  
22 are not permitted to access proprietary or client information  
23 that is not necessary to carry out their job responsibilities.  
24 And it states having physical access or systems access to this  
25 type of information does not equate to being authorized to

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1 access information.

2 And I quoted from pages 18-19 of the compliance  
3 manual.

4 Similarly, the Virtu confidential information policy  
5 referenced in paragraph 47 of the amended complaint and  
6 attached as Exhibit 2 to the moving declaration establishes  
7 policies requiring logical barriers and a permissioning system,  
8 and that's at pages 2-3 of that document. The amended  
9 complaint in this case itself acknowledges that employees  
10 accessing the FS Database generally are required to "enter  
11 their unique log-in credentials and could access only  
12 information necessary for their role at the firm. A process  
13 typically known as permissioning." Quoting paragraph 18 of the  
14 amended complaint.

15 The amended complaint and documents referenced by and  
16 incorporated in the complaint further demonstrate that Virtu  
17 maintained and enforced those policies and procedures through  
18 mandatory training for all employees, establishing supervisory  
19 responsibility for allowing access to sensitive data, mandatory  
20 annual compliance programs for all employees, and other  
21 safeguards. Employees were expressly trained not to access  
22 data outside their job responsibilities.

23 As the Virtu financial sensitive information barriers  
24 and client instruction training presentation referenced at  
25 paragraph 57 of the amended complaint and attached as Exhibit 3

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1 to the moving declaration states, "just because you can access  
2 it does not mean that you are authorized to access, use, or  
3 share it." Quoting from page 7.

4 So for example, your Honor --

5 THE COURT: The SEC alleges that, despite all of those  
6 statements of control and training, there was the ability to  
7 access the FS Database through direct access, and that method  
8 was widely used. So that all of the statements about the  
9 restrictions on access were misleading.

10 MR. REISNER: So, your Honor, I think that the  
11 allegations of the complaint and the documents that are  
12 referenced in the complaint demonstrate that, notwithstanding  
13 the allegations in the complaint, all of the statements were  
14 true and accurate, and could not be plausibly viewed as  
15 misleading under the circumstances of this case.

16 THE COURT: Hold on. So the SEC says, or alleges,  
17 that there is this other method of access in which the  
18 individuals at the firm can use this other means of access,  
19 which is more anonymous, to obtain direct access to the FS  
20 Database so that all of the statements about all of the  
21 particular restrictions are, at best, misleading.

22 Now, you say that's not fair, that's not accurate.  
23 The specific statements about all of the barriers and training  
24 and how seriously they're taken are true. The SEC says, but  
25 they're misleading.

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1           How can I decide a question of whether the statements  
2 were misleading in view of the contrary allegations in the  
3 complaint, on a motion to dismiss?

4           MR. REISNER: Your Honor, for the same reason that  
5 Judge Abrams in the *Philip Morris* and *Ferroglobe* cases, that  
6 Judge Failla in the *Ong v. Chipotle* case, and that Judge Swain  
7 in the *Barilli v. Sky Solar Holdings* case and Judge Oetken in  
8 the *Menaldi* case, all cited in our brief, granted motions to  
9 dismiss in like circumstances, because given the statements --

10           THE COURT: Each case has to be decided --

11           MR. REISNER: 100 percent.

12           THE COURT: -- on its own facts and on its own  
13 allegations.

14           MR. REISNER: 100 percent.

15           And in this case, when you look at the challenged  
16 statements, and you look at the allegations in the complaint  
17 and the materials attached to the complaint, there is no  
18 plausible basis to conclude that the statements could be  
19 misleading under these circumstances. And let me tell you why.  
20 There is no -- well, let me back up.

21           This hypothetical possibility that employees might be  
22 able to access certain post-trade information in the FS  
23 Database, which would have to overcome and violate the  
24 company's policies and procedures, would have to be  
25 inconsistent with the training offered, which would have to --

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1                   THE COURT: They say it's not hypothetical.

2                   MR. REISNER: No, there is no -- it is hypothetical.

3                   And that's because there is no allegation in the amended  
4                   complaint that proprietary traders saw any sensitive customer  
5                   post-trade data. There is no allegation in the amended  
6                   complaint that proprietary traders were even aware that the FS  
7                   Database contained any sensitive customer post-trade data.  
8                   There is no allegation in the complaint that any proprietary  
9                   trader actually accessed sensitive customer post-trade data.  
10                   There is no allegation in the complaint of any misuse of  
11                   sensitive customer data. There is no allegation in the amended  
12                   complaint of unauthorized access to sensitive customer  
13                   post-trade data. It's entirely hypothetical.

14                   And this hypothetical possibility that employees might  
15                   be able to access certain post-trade information in the FS  
16                   Database due to a temporary technological issue that was  
17                   self-identified by Virtu, and self-remedied by Virtu, as  
18                   acknowledged by the amended complaint, long before this SEC  
19                   investigation even started, cannot render untrue or misleading  
20                   Virtu's statements that it maintained and enforced information  
21                   barriers, policies, and procedures.

22                   You have to look at the statements that are alleged to  
23                   be misleading in the complaint, such as in paragraph 29.  
24                   "Virtu has established policies and procedures designed to  
25                   safeguard sensitive client information, including technology

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1 access controls to segregate sensitive information and review  
2 of approved personnel and permissions." That is absolutely  
3 true and accurate, based on the allegations in the complaint  
4 and the documents referenced in the complaint.

5 And this hypothetical notion where there is no  
6 allegation that any proprietary traders saw, were aware that  
7 the FS Database contained any sensitive information, accessed  
8 information, misused information, cannot overcome the fact that  
9 those are true and accurate statements, incapable of plausibly  
10 misleading any investor for the same reason that the judges in  
11 the cases I just mentioned reached similar conclusions.

12 THE COURT: Every case has to be decided on its own  
13 facts.

14 MR. REISNER: Absolutely. And the facts here, based  
15 on the statements in the amended complaint and the facts that  
16 are set forth in the amended complaint and the documents  
17 attached to the amended complaint, demonstrate that the  
18 statements are true.

19 THE COURT: Okay. I have that argument.

20 MR. REISNER: Okay. And it's very much like the --  
21 absolutely every case has to be decided on its own merits.  
22 But, in each of the cases that I just mentioned, the same  
23 principle has been applied to dismiss the allegations of  
24 securities law violations in those cases on the same logic.

25 Here, based on the undeniable facts about what the

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1 amended complaint alleges and doesn't allege, the only  
2 plausible conclusion is that no investor could be misled, just  
3 like in the *Philip Morris* case where Judge Abrams ruled --

4 THE COURT: Okay. I have your argument on that. Go  
5 ahead.

6 MR. REISNER: Just I was just going to refer to some  
7 of the language used by Judge Abrams, Judge Failla, Judge  
8 Oetken.

9 THE COURT: I have that argument. I heard the litany.

10 MR. REISNER: Okay.

11 In addition to the statements being true and accurate,  
12 the statements are also inactionable for the related reason  
13 that they consist of generalized assertions of corporate policy  
14 and practice that did not provide any guarantees or absolute  
15 assurances regarding the efficacy of those policies and  
16 practices.

17 I read paragraph 29 of the amended complaint. That is  
18 a classic generalized assertion of corporate policy and  
19 procedure as are the allegations in paragraph 30 and 31, such  
20 as paragraph 30: "Prior to merging, both Virtu and ITG each  
21 maintained our own procedures to segregate and protect  
22 sensitive client data." That is indisputably a true, accurate  
23 and generalized inactionable statement.

24 Same thing with paragraph 31. The challenged  
25 statement is: "Post-closing, Virtu intends to continue to

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1 maintain and enforce appropriate information barriers to  
2 segment and protect sensitive client data." There is no basis  
3 to conclude that that's misleading based on the allegations in  
4 the complaint. And in addition, that, too, is a generalized  
5 assertion of corporate policy and practice that's inactionable.  
6 Just very similar to the statement in *ECA v. JPMorgan* found to  
7 be inactionable that the company maintained risk management  
8 processes that were highly disciplined and designed to preserve  
9 the integrity of the risk management process.

10 The recent case by Judge Engelmayer last month in the  
11 *Solar Winds* case reached a similar conclusion. Judge  
12 Engelmayer called statements non-actionable corporate puffery,  
13 inactionable as a matter of law. Statements are very similar  
14 to the challenged statements here. The statements there were  
15 that the company "places a premium on the security of its  
16 products and makes sure that everything is backed by sound  
17 security processes, procedures and standards." And also that  
18 the company "equips technology professionals with tools to help  
19 monitor, manage, and secure today's complex environment."

20 The statements challenged by the SEC here are  
21 virtually identical in kind to the statements challenged by the  
22 SEC in the *Solar Winds* case that were dismissed as inactionable  
23 by Judge Engelmayer. They are simply too generic to express  
24 any objective fact as a matter of law.

25 So that's our argument, your Honor, with respect to

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1 the Section 17(a)(2) and (a)(3) claims. True and accurate,  
2 based on the allegations of the complaint, not capable of  
3 plausibly being viewed as misleading, and of a generalized  
4 matter, generalized assertion of corporate policy and practice  
5 that are inactionable.

6 Unless there are any questions, I'll move on to our  
7 Section 15(g) arguments.

8 THE COURT: Go ahead.

9 MR. REISNER: The Section 15(g) claim also should be  
10 dismissed. Because the only plausible inference from the  
11 amended complaint and documents referenced in the amended  
12 complaint is that Virtu established, maintained, and enforced  
13 written policies and procedures reasonably designed to prevent  
14 the misuse of sensitive information.

15 Those allegations and documents, for the reasons I've  
16 described, demonstrate that Virtu established, maintained, and  
17 enforced policies providing for prohibitions on the misuse of  
18 sensitive data, prohibitions on accessing non-permission data,  
19 physical information barriers, and logical information  
20 barriers.

21 The fact that Virtu, as acknowledged in the amended  
22 complaint, self-identified and self-remedied the technological  
23 issue demonstrates that the company established, maintained,  
24 and enforced policies and procedures reasonably designed under  
25 Section 15(g).

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1                   Again, this hypothetical risk, backed up by no  
2 specific allegations in the amended complaint, cannot refute  
3 these expressed policies and procedures set forth in the  
4 amended complaint, and the documents referenced in it the  
5 amended complaint.

6                   In fact, the failure of the SEC to allege in the  
7 amended complaint any actual improper access or any misuse of  
8 sensitive data also demonstrates the effectiveness of Virtu's  
9 policies. The SEC had more than 3 years to investigate this  
10 case. And they investigated this case for more than 3 years,  
11 they obtained more than 30,000 documents. They obtained  
12 scripts or code from the traders to determine whether or not  
13 that code contained any evidence of access to sensitive  
14 information. There was no evidence, and there is no  
15 allegations of any such access in the amended complaint.

16                   The SEC is not in a position to allege and has not  
17 alleged any improper access.

18                   THE COURT: But the SEC alleges that the procedures  
19 were not reasonably designed to assure that material,  
20 non-public information is not accessed. So, the issue is  
21 whether as a matter of law the defendants can say no, the  
22 allegations in the complaint are insufficient to show that we  
23 didn't have procedures that were "reasonably designed." That's  
24 not a question of what the result of the procedures were. It's  
25 a question of whether the procedures were "reasonably designed"

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1 to assure what they were supposed to prevent.

2                   What similar cases are there which say that similar  
3 SEC allegations with respect to "reasonably designed" are  
4 insufficient? It's not a question of whether empirically they  
5 do or do not result in the impermissible accesses to material,  
6 non-public information. It is a question of whether the  
7 procedures were reasonably designed. Reasonableness usually is  
8 not something that can be decided on a motion to dismiss.

9                   So, what cases are there under 15(g) where the Court  
10 says that the allegations should be dismissed on a motion to  
11 dismiss?

12                   MR. REISNER: So, there are no cases either way under  
13 Section 15(g). The case we cite in our brief that's most on  
14 point is *Bassaw v. United Industries Corporation*, 482 F.Supp.3d  
15 80, 87 (S.D.N.Y. 2020), in which the Court held where only one  
16 inference may be drawn as to reasonableness, then it becomes a  
17 question of law that can be resolved on a motion to dismiss and  
18 in this case --

19                   THE COURT: But there are lots of other cases, once  
20 it's conceded that there are no cases under 15(g), which  
21 attempt to determine whether reasonableness is something that  
22 can be decided on a motion to dismiss. There are lots of other  
23 cases in other areas of the law that say reasonableness is not  
24 something that can be decided as a matter of law on a motion to  
25 dismiss.

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1                   So, you say there's one other case where  
2 reasonableness as a matter of law was determined on a motion to  
3 dismiss in another area. That's not profoundly persuasive.

4                   MR. REISNER: I think there are two other cases that  
5 we cite with *Bassaw* on the brief on the same page. So, *Bassaw*  
6 is not the only case that stands for this proposition. And  
7 there just isn't that much litigation under Section 15(g) in  
8 general, so it's not surprising that this issue hasn't come up  
9 in the context of 15(g).

10                  But there are several cases in which courts have found  
11 where only one inference may be drawn as to reasonableness,  
12 then it becomes a question of law that can be resolved on a  
13 motion to dismiss. And here, based on the allegations and the  
14 lack of allegations, the only reasonable inference based on the  
15 materials set forth in the amended complaint --

16                  THE COURT: The 17(a)(3) claim proceeds against VAL in  
17 any event. So what's the practical effect of granting the  
18 motion to dismiss?

19                  MR. REISNER: Oh, I think that the Court should  
20 streamline the matter by --

21                  THE COURT: I should give a haircut to the case.

22                  MR. REISNER: Yeah.

23                  THE COURT: Will it have any practical effect?

24                  MR. REISNER: I think it will have substantial  
25 practical effect.

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1                   THE COURT: Why?

2                   MR. REISNER: It will limit the claims available to  
3 the SEC, and the scope of remedies available to the SEC based  
4 on the --

5                   THE COURT: Sure. But hold on. Discovery would go  
6 forward on the same issues for the same scope, and it would  
7 follow as the night the day that at the end of discovery there  
8 would be a motion for summary judgment, at which point all of  
9 these arguments would be raised on a full factual record,  
10 including what happened in terms of the alleged access to  
11 material, non-public information, so, and it would be decided  
12 on a full record, a full summary judgment record after  
13 discovery. And discovery I assume isn't going to be limited in  
14 any way when there is a 17(a)(3) claim against VAL.

15                  MR. REISNER: Yeah. So very practically, your Honor,  
16 look, paragraph -- the statements challenged in paragraphs 29,  
17 30, 31 in our view are just obviously inactionable for the  
18 reasons I just described. The other statements are  
19 inactionable as well, but those are so obviously inactionable  
20 they should be dismissed and that will have a real impact.  
21 Because the SEC will know that those statements are not in the  
22 case, and the SEC, I suspect, may view this case quite  
23 differently if those statements are not in the case.

24                  There is no reason not to, at the very least, dismiss  
25 those statements, which are inactionable on their face, from

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1 this case, and we would view that as the proper outcome under  
2 the law and of significant practical impact as this case moves  
3 forward. Maybe it won't narrow discovery, but it will narrow  
4 the impact and potential remedies available in this case.

5 THE COURT: Okay. Go ahead.

6 MR. REISNER: Thank you, your Honor. That's all we  
7 have, unless there are any further questions from the Court.

8 THE COURT: No. Thank you.

9 SEC.

10 MR. TAAFFE: Thank you, your Honor. I think many of  
11 the points that I would have made in response to Mr. Reisner's  
12 arguments are ones that the Court's own questions elicited.  
13 So, I just like to respond briefly to a few things that he  
14 said, but of course I'll respond to any questions that the  
15 Court has in the meantime.

16 I think that the Court's questions really get to the  
17 heart of the SEC's position here, which is that a lot of the  
18 arguments that we've heard in the motion to dismiss are really  
19 factual questions, best posed in the context of a summary  
20 judgment motion or to a trier of fact.

21 We cite in our brief the *Strata Association* case that  
22 generally it's not appropriate on a motion to dismiss to make  
23 decisions about whether something is misleading, unless  
24 reasonable minds couldn't differ. And our amended complaint in  
25 the first instance and then our opposition to the motion to

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1 dismiss goes paragraph by paragraph, statement by statement,  
2 and says quite clearly why we believe a reasonable mind can  
3 conclude that these statements are misleading.

4 If there are any specific questions, I'm happy to  
5 address them, but I'll just take one that Mr. Reisner spoke to.  
6 Which is he referred to the November 2018 and March 2019 public  
7 presentations which were amended complaint paragraph 29, and he  
8 talked about the broad language of having established policies  
9 and procedures designed to safeguard sensitive information.

10 That's not the entirety of the statement. The  
11 statement then goes on to refer to technology access controls  
12 to segregate sensitive information and review of approved  
13 personnel and permissions.

14 And the heart of our complaint is that the  
15 technological access controls in particular with respect to the  
16 FS Database direct access method, that the technological access  
17 controls, that phrase, does not mean what it sounds like.  
18 Because what it sounds like is that each person gets access or  
19 does not get access as a technological matter based on their  
20 job description, and that wasn't true. That's the whole  
21 problem with the generic log-ins.

22 Similarly, they refer to review of approved personnel  
23 and permissions, but we also allege that with respect to the  
24 direct access method of the FS Database, there was no review of  
25 approved personnel and permissions.

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1                   So, we think that these are just black-and-white  
2 false, but at the very least misleading, and we explain why  
3 that's true with respect to each of the statements at issue.

4                   THE COURT: The gist of the defendants' position, not  
5 to oversimplify, is that the SEC has been conducting an  
6 investigation for years and hasn't come up with any specific  
7 examples where the database was in fact misused. So, it  
8 ill-behooves the SEC to argue in its complaint that these  
9 statements were misleading, because in fact, the procedures of  
10 the defendants have been sufficient, otherwise the SEC would  
11 have come up with examples where the procedures were abused.

12                  Now, I fully understand the SEC's position that we're  
13 talking about whether the procedures were reasonably designed.  
14 But is there no other answer to that argument, other than the  
15 question is whether they were reasonably designed?

16                  Now, I mean, I can hypothesize about other answers,  
17 including the ability to disguise or evade the use of material,  
18 non-public information. But I just want to make sure that I  
19 understand the SEC's position.

20                  MR. TAAFFE: Sure. It's a bit of a layered question.  
21 I think it is an important one and it kind of gets to 15(g) and  
22 also the misstatements a little bit.

23                  Starting with the misstatements, I mean, the  
24 misstatements are either misleading or they're not. We think  
25 on their own merits, and we explain why each one we think is

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1 misleading, but moving to 15(g), this is something that is  
2 really relied on quite extensively in the motion to dismiss,  
3 this idea that the SEC hasn't been able to adduce evidence or  
4 even allege actual misuse of the database. And there are  
5 several responses, we think each of which is just dispositive  
6 in this context.

7 The first is, as a technical matter, 15(g) does not  
8 have as an element -- a violation of 15(g) does not require  
9 showing actual misuse. It's just how the system is designed.  
10 And we can all imagine systems, maybe not this one, but just in  
11 life, in general, that could be egregiously flawed in design,  
12 but they may not be exploited just by sheer luck. Or maybe the  
13 design flaw is such -- and this does get more to this case --  
14 that the system could have been exploited, but the system  
15 itself is incapable of determining that.

16 So, as we explain in our opposition, what we have here  
17 is not an absence of allegations because we sifted through all  
18 the evidence and we just couldn't point our finger to any.  
19 There is no evidence. In our investigation, it was lengthy,  
20 and part of the reason it was lengthy was because we expended  
21 so much effort trying to answer this very question, going back  
22 and forth, seeking log-in information and anything else we  
23 could find, that might show misuse. But the problem is that  
24 the way their system was designed, in part due to this generic  
25 log-in, it didn't track who was logging in, or once they logged

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1 in, what they were doing with it. Virtu doesn't know what  
2 anybody viewed once they got into the FS Database. And as a  
3 result, they can't tell us -- we asked the questions as best we  
4 could, and ultimately I think both parties agree that that  
5 information just doesn't exist.

6 So, if their system did not track activity in their  
7 database in a way that would preserve evidence of misuse, we  
8 think it's a little cynical to fault the SEC for failing to  
9 allege anything based on the absence of facts, especially in a  
10 circumstance where the absence of misuses or the evidence of  
11 misuse is not an element.

12 It's not an element of 15(g) for the further reason  
13 that one could imagine a case where maybe evidence could be  
14 found of misuse. Not this case, because it can't be. But a  
15 different case where it could be, but the SEC could move  
16 forward with a 15(g) allegation alleging unreasonable design  
17 before that system's exploited.

18 That's the purpose of Section 15(g), is to enable us  
19 to come in and ensure that we are able to take action where  
20 necessary without waiting for something to go terribly wrong.

21 So all of those things together we think suggest that  
22 this absence of misuse is just not relevant at this point.  
23 Maybe it could be a factual point raised down the road. That  
24 wouldn't surprise me. But it is certainly not dispositive. It  
25 can't be a basis to rule as matter of law we feel on this

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1 question.

2 So that's our 15(g) point.

3 THE COURT: You also agree there are no cases?

4 MR. TAAFFE: We definitely agree there are no cases.

5 We're in a bit of the unknown here, at least as far as  
6 precedents go. And certainly we know there are all sorts of  
7 cases applying a reasonableness standard, and the take away we  
8 have from those cases, which we cited in our opposition, is  
9 that generally reasonableness is a question of fact.

10 And certainly in this case, at least we think that the  
11 allegations are more than sufficient to allow a finder of fact  
12 to develop the record and see whether they were actually  
13 reasonable in practice.

14 We expect to have expert testimony on the question of  
15 system design, and we expect that testimony to say this was not  
16 a reasonable approach to the question. But again, those are  
17 all questions that we think can be developed through discovery  
18 and are not appropriately addressed on a motion to dismiss.

19 Turning briefly to the Section (a)(2) and (a)(3)  
20 questions. Unless your Honor would like me to, I don't intend  
21 to go through the statements point by point. We do that in our  
22 opposition, we do it in the amended complaint itself. I would  
23 simply say a couple of things.

24 The first is that we've heard a lot of argument about  
25 these statements being too general to be actionable. We think

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1 that they're not. I gave you the example of Section 29 where  
2 it's one thing to say that we have intentions to safeguard  
3 information or we have systems designed to do that. Those  
4 broad statements I think would be a harder argument, but it is  
5 an argument we're not faced with because there are specific  
6 statements in each misstatement that we allege that are  
7 statements of fact. Whether there are access controls, whether  
8 there are entitlement reviews, whether there are password  
9 permissioning. Those are things that are true or false, and  
10 they're things that the listener to a statement would have been  
11 entitled to rely on in deciding whether to trust Virtu with  
12 their sensitive information.

13 This case features in large part statements made in  
14 response to questions that VAL's customers submitted. And they  
15 submitted very pointed questions that really get to why this  
16 case is important. They were concerned about what access  
17 proprietary traders had and what measures existed to ensure  
18 that their post-trade information could not be viewed by people  
19 who shouldn't be viewing it. That's the way they submitted  
20 those questions. And the language of Section 17(a)(2) speaks  
21 to, in light of the circumstances under which the statements  
22 were made, whether they're misleading.

23 The circumstance here is that these statements are  
24 being made in response to very pointed questions with respect  
25 to VAL on these issues, and with respect to VFI to the

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1 investing public as a whole on a very critical subject.

2 So, these are statements that you can identify as true  
3 or false, that are capable of verification in the language of  
4 *In re Ford*, and that are sufficiently specific that a  
5 reasonable investor could interpret them as a basis to act.  
6 And that's the *Suarez* case.

7 We would also note this is not a one-off conversation  
8 between a couple of individuals. These are repeated statements  
9 to the public at large and to investors over the course of  
10 months on a critical subject. And we cite three cases, *BHP*,  
11 *Petrobras*, and *Richman*, all Southern District. Those  
12 statements, even if they may be puffery or inactionable in  
13 isolation, when they're repeated time and time again on the  
14 same subject, that they can become material.

15 So we think they're material even in isolation here,  
16 but certainly, in the aggregate, we think that a reasonable  
17 mind can conclude these statements were materially misleading,  
18 and that's why we brought this case.

19 Finally, I would on Section 17(a)(3), I think our  
20 brief lays out our position on this, but I would just follow up  
21 on one question the Court had which is what's the practical  
22 effect here. If we're moving forward on discovery with the  
23 misstatements, and we think we should for the reasons we've  
24 said, we are going to be asking questions in discovery about  
25 everything to do with the misstatements, we'll find out how

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1       they were disseminated and all these things.

2           There are two cases, and these are not in our brief,  
3 but I'll just tell you because they seem important given the  
4 Court's question. In the last year, *SEC v. Gallagher*, that's  
5 21-8739 Judge Castel. And then *SEC v. Rosenberger*, 22-3736,  
6 that's Judge Cote. In both of these case, there was a similar  
7 situation where there were alleged misstatements, and those  
8 statements were alleged to comprise part of a scheme under both  
9 the scienter position and Section 17. And in both cases the  
10 Court allowed the misstatement provisions to go forward on a  
11 motion to dismiss and said, look, because the misstatements are  
12 going under (a) (2), we won't get into the weeds about whether  
13 they're actionable under (a) (3) at this point. We can take it  
14 up in summary judgment context.

15           And we think that's an easy way to handle it here,  
16 although for the reason we say in our brief, we think the  
17 statements are actionable under 17(a) (3). And I'm happy to  
18 answer any questions the Court has.

19           THE COURT: No. Thank you. All right.

20           No, if the defense wants to.

21           MR. REISNER: Very briefly, your Honor.

22           Just looking at the paragraph 29 statement that the  
23 SEC's counsel alluded to. That is specifically Virtu has  
24 established policies and procedures designed to safeguard  
25 sensitive client information, including technology access

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1 controls to segregate sensitive information and review of  
2 approved personnel and permissions.

3 That is indisputably accurate based on all of the  
4 policies and procedures that I read at the beginning. Virtu  
5 has technology access controls. Virtu segregates sensitive  
6 information. Virtu includes a review of approved personnel and  
7 permissions. It says it right in the amended complaint and the  
8 documents referenced in the complaint.

9 The SEC's theory is that because Virtu omitted  
10 information about this direct access to the FS Database,  
11 without appropriate permissioning, that that somehow renders  
12 false and misleading otherwise absolutely truthful statements.  
13 That position is not defensible based on the allegations in the  
14 complaint and the absence of allegations in this complaint.

15 It is really very much like -- absolutely every case  
16 is its own facts -- but it's the same theory that was rejected  
17 by Judge Failla in *Ong v. Chipotle* where Judge Failla ruled  
18 that the allegations in the amended complaint do not conflict  
19 with defendants' statements that were in place, which did not  
20 amount to a guarantee --

21 THE COURT: Okay.

22 MR. REISNER: -- with regard to the efficacy of those  
23 practices, and --

24 THE COURT: Okay. I mean, I have your argument on  
25 that.

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1 MR. REISNER: Okay. Thank you, your Honor.

2 THE COURT: Okay. I'm prepared to decide.

3 The Securities and Exchange Commission ("SEC") brought  
4 this action against Virtu Financial Inc. ("VFI") and Virtu  
5 Americas LLC ("VAL"), alleging violations of Sections 17(a)(2)  
6 and 17(a)(3), of the Securities Act of 1933, and violations of  
7 Section 15(g) of the Securities Exchange Act of 1934.

8 The defendants now move to dismiss the first amended  
9 complaint pursuant to Federal Rule of Civil Procedure 12(b)(6),  
10 except for the claim pursuant to Section 17(a)(3) of the  
11 Securities Act against VAL.

12 The following facts are taken from the first amended  
13 complaint and are accepted as true for purposes of this motion.

14 The defendant VFI is a corporation headquartered in  
15 New York that owns common stock that is registered pursuant to  
16 Section 12(b) of the Exchange Act. VFI's common stock trades  
17 on the Nasdaq. The second defendant, VAL, is a registered  
18 broker-dealer and subsidiary of VFI. VAL operates two types of  
19 businesses: (1) customer-facing execution services which  
20 generate material, non-public information ("MNPI") regarding  
21 customers' trade orders and executions; and (2) proprietary  
22 trading operations.

23 The SEC alleges that in July 2017, VFI acquired KCG  
24 Holdings Inc. which owned a broker-dealer firm with a large  
25 trade execution business. At the same time, VFI formed VAL

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1 which operated the customer-facing trade execution business  
2 acquired from KCG and some of KCG's proprietary trading  
3 business. As a result of this acquisition, VAL bought and sold  
4 orders for large institutional customers.

5 Pursuant to Section 15(g) of the Exchange Act, VAL was  
6 required to establish, maintain, and enforce written policies  
7 is and procedures to prevent the misuse of MNPI, see 15 U.S.C.  
8 Section 78o(g). The SEC alleges that VAL "purported to  
9 maintain information barriers which are a standard method used  
10 by broker-dealers and other financial institutions to prevent  
11 the use of MNPI by VAL and its associated persons."

12 From January 2018 to April 2019, the SEC alleges that  
13 VAL maintained a primary database for daily business operations  
14 and a backup database (collectively the "FS Database"), that  
15 contained all post-trade information generated from VAL's  
16 customer orders, including, among other items,  
17 customer-identifying information, the security name, the side  
18 (buy or sell) and the execution price and volume. VAL's  
19 employees could access the FS Database either (1) by logging  
20 into the graphical user interface ("GUI") using each employee's  
21 unique credentials (the "permissioning method"), or (2) by  
22 using a user name and password (the "direct access method").  
23 When accessing the FS Database using the direct access method,  
24 VAL employees used generic credentials that were widely shared,  
25 regardless of the employee's role at the firm or the business

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1 need.

2                   The SEC alleges that no later than January 2018, VAL  
3 began storing sensitive customer trade execution information in  
4 the FS Database which also housed the preexisting proprietary  
5 trade data. The SEC alleges that under VAL's policies and  
6 procedures at the time, proprietary traders were supposed to be  
7 walled off from access to certain customer trade details to  
8 prevent them from having access to MNPI. Despite these  
9 policies, the SEC claims, that virtually all employees  
10 effectively had unrestricted access to the MNPI in the FS  
11 Database. The SEC therefore complains that VAL failed to  
12 implement and enforce effective policies and procedures with  
13 respect to the direct access to the FS Database, one of the  
14 primary means of accessing MNPI.

15                   The SEC alleges that in approximately August 2018,  
16 VAL's database developers started to discuss the need to  
17 improve the safeguards to access the FS Database. These  
18 discussions included an e-mail that was sent on August 13,  
19 2018, to over 20 VAL employees. The SEC alleges that, despite  
20 VAL's recognizing the need for improvements, VAL took no  
21 immediate steps to mitigate the risk of misuse of the MNPI.  
22 Instead, for another eight months, VAL allegedly continued to  
23 enter customer post-trade information into the FS Database  
24 without improving its protocols to access to the FS Database.  
25 During that time period, VAL handled approximately 25 percent

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1 of all market orders placed by retail investors in the United  
2 States, and during this time the SEC alleges that proprietary  
3 traders could access and misuse the MNPI.

4 The SEC alleges that during this time period, the  
5 defendants made and disseminated materially misleading  
6 statements and omissions to customers and the public regarding  
7 VAL's protocols to access the MNPI. In presentations on  
8 November 7, 2019 and March 13, 2019, VFI asserted that "Virtu  
9 has established policies and procedures designed to safeguard  
10 sensitive client information, including technology access  
11 controls to segregate sensitive information, and review of  
12 approved personnel and permissions." VFI's CEO allegedly  
13 reiterated these statements to the public in November 2018. On  
14 approximately March 1, 2019, the SEC alleges that the  
15 defendants disseminated a letter to VAL customers describing  
16 the procedures to "segregate and protect sensitive client  
17 data," but omitting the availability of direct access to the FS  
18 Database by VAL's proprietary traders.

19 Thereafter, in a January 25, 2019, press release,  
20 regarding VFI's most recent acquisition, the SEC alleges that  
21 the defendants asserted that Virtu would "continue to maintain  
22 and enforce appropriate information barriers to segment and  
23 protect sensitive client data." The SEC also alleges that in  
24 response to customer due diligence questionnaires, VAL did not  
25 reveal that its employees could access MNPI through the direct

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1 access method.

2 The SEC alleges that the alleged creation and  
3 dissemination of these misleading statements violated  
4 Section 17(a)(2) and 17(a)(3) of the Securities Act of 1933.

5 The SEC alleges that during the relevant time period,  
6 January 2018 to April 2019, VAL obtained money or property in  
7 the form of commissions VAL charged on the trades it executed  
8 on its customers' behalf, and money it obtained from customers  
9 by executing trades with those customers "by means of its false  
10 or materially misleading statements" regarding its employees'  
11 access to the FS Database and VFI, as VAL's parent company, in  
12 turn also received money or property from its false or  
13 misleading statements.

14 The SEC alleges that, despite its public statements to  
15 the contrary, VAL did not have policies or procedures in place  
16 that addressed the FS Database and that VAL "provided no  
17 training or other directives to its employees regarding the  
18 expectations for use of that database and its highly sensitive  
19 information." The SEC complains that the direct access method  
20 of interacting with the FS Database was "widely used," and that  
21 traders complained in internal chat messages that they ran into  
22 a alerts stating that the system had exceeded the number of  
23 users allowed. In response, VAL allegedly increased the  
24 available number of simultaneous direct access log-ins from 75  
25 in November 2019 to 125 users by the end of that month.

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1                   The SEC alleges that VAL did not know which employees  
2 were using the FS Database, or how the FS Database was being  
3 used during this time. The SEC maintains that VAL had  
4 automated systems and policies in place during the relevant  
5 period, including, among others, a database developed to  
6 monitor the FS Database, lockdown systems designed to detect  
7 abnormal trading activity, and employing training about access  
8 to sensitive information. But the SEC alleges that these  
9 systems and policies were not designed to detect and prevent  
10 other potential misconduct, and specifically the misuse of MNPI  
11 in the FS Database. As a result of this conduct, the SEC  
12 alleges that VAL violated Section 15(g) of the Exchange Act.

13                   The SEC filed a complaint in this court on  
14 September 12, 2023. The defendants moved to dismiss the  
15 complaint on December 4, 2023. Thereafter, upon consent of the  
16 defendants, the SEC filed an amended complaint on January 12,  
17 2024.

18                   In the first amended complaint, the SEC asserts five  
19 causes of action, namely: (1) violations of Section 17(a) (2)  
20 of the Securities Act against VFI; (2) violations of  
21 Section 17(a) (2) of the Securities Act against VAL; (3)  
22 violations of Section 17(a) (3) of the Securities Act against  
23 VFI; (4) violations of Section 17(a) (3) of the Securities Act  
24 against VAL; and (5) violation of Section 15(g) of the Exchange  
25 Act against VAL.

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1                   The defendants now move to dismiss all the claims  
2 except the Section 17(a)(3) claim against VAL.

3                   In deciding a motion to dismiss pursuant to Rule  
4 12(b)(6), the allegations in the complaint are accepted as true  
5 and all reasonable inferences must be drawn in the plaintiff's  
6 favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191  
7 (2d Cir. 2007). The Court's function on a motion to dismiss is  
8 not to weigh the evidence that might be presented at a trial,  
9 but merely to determine whether the complaint itself is legally  
10 sufficient. *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir.  
11 1985). The Court should not dismiss the complaint if the  
12 plaintiff has stated enough facts to state a claim to relief  
13 that is plausible on its face. *Bell Atl. Corp. v. Twombly*. 550  
14 U.S. 544, 570 (2007). "A claim has facial plausibility when  
15 the plaintiff pleads factual content that allows the court to  
16 draw the reasonable inference that the defendant is liable for  
17 the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
18 (2009).

19                   While the Court should construe the factual  
20 allegations in the light most favorable to the plaintiff, the  
21 tenet that a court must accept as true all the allegations  
22 contained in the complaint is inapplicable to legal  
23 conclusions. When presented with a motion to dismiss pursuant  
24 to Rule 12(b)(6), the Court may consider documents that are  
25 referenced in the complaint, documents that the plaintiff

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1 relied on in bringing suit and that are either in the  
2 plaintiff's possession or that the plaintiff knew of when  
3 bringing suit or matters of which judicial notice may be taken.  
4 *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir.  
5 2002).

6 The SEC claims that VAL violated Section 15(g) of the  
7 Exchange Act by failing to design and enforce reasonable  
8 measures to safeguard the MNPI. The SEC argues that the  
9 defendants violated Sections 17(a)(2) and 17(a)(3) of the  
10 Securities Act by making and disseminating false and misleading  
11 statements about their systems for protecting customers' MNPI.

12 The defendants move to dismiss the Section 15(g) claim  
13 because the defendants contend that the defendants complied  
14 with statutory requirements and that the Section 17(a) claims  
15 should be dismissed because the challenged statements were  
16 accurate and thus not actionable. The defendants also contend  
17 that the SEC's Section 17(a)(3) claim against VFI should be  
18 dismissed because the first amended complaint does not allege  
19 that VFI engaged in conduct "beyond the challenged statements  
20 themselves."

21 Section 15(g) of the Exchange Act provides that "every  
22 registered broker or dealer shall establish, maintain, and  
23 enforce written policies and procedures reasonably designed,  
24 taking into consideration the nature of such broker's or  
25 dealer's business to prevent the misuse of material, non-public

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1 information." 15 U.S.C. Section 78o(g). The SEC alleges that  
2 VAL violated Section 15(g) by failing to design, maintain, and  
3 enforce reasonable measures to prevent the misuse of MNPI.

4 The defendants argue that the SEC has failed to show  
5 that VAL's policies and procedures to safeguard the MNPI were  
6 "unreasonable." But the defendants misconstrue the proper  
7 formulation of the statute. The statute requires that VAL have  
8 written policies and procedures that are "reasonably designed"  
9 to prevent the misuse of MNPI. And the SEC alleges that the  
10 measures that VAL adopted to protect MNPI, including VAL's  
11 training and its lockdown systems, were not reasonably designed  
12 to prevent the misuse of MNPI. The SEC has alleged why it  
13 contends that VAL's procedures are not reasonably designed to  
14 prevent the misuse of MNPI.

15 For purposes of a motion to dismiss, it is the  
16 defendants' burden to show, as a matter of law, that the  
17 plaintiff has failed to plead a plausible claim -- namely, that  
18 the defendants in this case have failed to establish policies  
19 and procedures that were "reasonably designed." The defendants  
20 ask the Court to find as a matter of law that VAL's procedures  
21 were in fact reasonably designed to accomplish its purpose.  
22 The parties agree that there is no similar case construing  
23 Section 15(g) of the Securities Act. But, reasonableness is  
24 generally an issue of fact that cannot be decided on a motion  
25 to dismiss, as courts have found in other cases, construing

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1 other laws, see, e.g., *Benefield v. Pfizer, Inc.*, 103 F.Supp.3d  
2 449, 462 (S.D.N.Y. 2015) (construing design defect and  
3 manufacturing defect claims); *Cooper v. Anheuser-Busch, LLC*,  
4 553 F.Supp.3d 83, 95-97 (S.D.N.Y. 2021) (construing deceptive  
5 labeling claim laws); *Prysmian Cables & Systems U.S.A., LLC v.*  
6 *ADT Commercial, LLC*, 665 F.Supp.3d 266, 245 (D. Conn. 2023)  
7 (construing generally accepted practices and procedures).

8 In light of the allegations regarding the "unfettered"  
9 access to the FS Database, and the alleged gaps in VAL's  
10 safeguards to prevent misuse of the MNPI, the question of  
11 whether VAL's policies can be considered reasonable as a matter  
12 of law cannot be decided on a motion to dismiss. The motion to  
13 dismiss the SEC's claim under Section 15(g) against VAL is  
14 therefore denied.

15 Section 17(a) (2) of the Securities Act forbids "any  
16 person in the offer or sale of securities" "to obtain money or  
17 property by means of any untrue statement of a material fact or  
18 any omission to state a material fact necessary in order to  
19 make the statements made in light of the circumstances under  
20 which they were made not misleading." 15 U.S.C.  
21 Section 77q(a) (2).

22 The SEC alleges that the defendants violated the  
23 statute by making false and materially misleading statements  
24 regarding their policies and procedures to protect customers'  
25 MNPI. The SEC claims that the defendants made these statements

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1 in the course of public presentations, a customer letter, a  
2 press release, and responses to customers' questionnaires.

3 Each of these statements allegedly described the effectiveness  
4 of the defendants' protections for confidential information,  
5 none disclose any gap in these protections, and none reveal  
6 that employees could access the FS Database through the direct  
7 access method.

8 It is well-established that "literally true statements  
9 that create a materially misleading impression will support  
10 claims for securities fraud." *Set Capital, LLC v. Credit Suisse*  
11 *Group AG*, 996 F.3d 64, 85, (2d Cir. 2021) (addressing alleged  
12 violations of Section 10(b) of the Exchange Act); *Wilson v.*  
13 *Merrill Lynch*, 671 F.3d 120, 130 (2d Cir. 2011) (discussing the  
14 adequacy of disclosures in the context of other provisions of  
15 the Exchange Act). And, because reasonable minds could differ  
16 "on the question of whether the statements alleged in the  
17 complaint were misleading in light of the circumstances is  
18 under which they were made," this Court cannot resolve this  
19 question on a motion to dismiss. See *S.S. Trade Association of*  
20 *Baltimore International Longshoreman's Association Pension Fund*  
21 *v. Olo, Inc.*, 2023 WL 4744197, \*4 (S.D.N.Y. July 25, 2023).

22 therefore, the defendants' motion to dismiss the SEC's  
23 claims pursuant to Section 17(a)(2) against VAL and VFI is  
24 denied.

25 To assert a claim under Section 17(a)(3) of the

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1 Securities Act against VFI, the SEC must allege that VFI  
2 "through any means or instruments of transportation or  
3 communication in interstate commerce or by use of the mails"  
4 engaged in "any transaction, practice, or course of business  
5 which operates or would operate as a fraud or deceit upon the  
6 purchaser." 15 U.S.C. Section 77q(a) (3). In the first amended  
7 complaint, the SEC alleges that VFI violated Section 17(a) (3)  
8 by repeatedly making and disseminating false and misleading  
9 statements about the policies and procedures it adopted to  
10 protect MNPI.

11 The defendants move to dismiss this claim, arguing  
12 that in the Second Circuit, misstatements or omissions --  
13 without more -- cannot form the basis for liability under  
14 Section 17(a) (3). Rather, the defendants argue, it is  
15 necessary for the SEC to plead that the defendant undertook a  
16 scheme that went beyond mere representations. The defendants  
17 also proceed to argue that VFI's dissemination of its own  
18 misrepresentations is insufficient to establish liability under  
19 Section 17(a) (3), and that if dissemination of  
20 misrepresentations is sufficient for scheme liability, the  
21 defendant must disseminate misrepresentations made by others.  
22 In support of this argument, the defendants rely on *SEC v. Rio*  
23 *Tinto PLC*, 41 F.4th 47 (2d Cir. 2022). In that case, the  
24 Second Circuit Court of Appeals held that "misstatements and  
25 omissions can form part of a scheme liability claim pursuant to

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1 Sections 17(a)(1) and 17(a)(3) of the Securities Act, and  
2 Sections 10(b) of the Exchange Act, but an actionable scheme  
3 liability claim also requires something beyond misstatements  
4 and omissions, such as dissemination," *Id.* at 49. But *Rio*  
5 *Tinto* does not answer the question of whether a defendant's  
6 dissemination of its own misstatements is insufficient for  
7 liability under Section 17(a)(3).

8 In this case, the SEC alleges that VFI disseminated  
9 the misstatements that VFI allegedly made. The defendants  
10 contend that because VFI made the statements it disseminated,  
11 VFI cannot be subject to liability under Section 17(a)(3). The  
12 defendants point to *Lorenzo v. SEC* 587 U.S. 71 (2019), in which  
13 the Supreme Court considered whether "those who do not make  
14 statements but who disseminate false and misleading statements  
15 to potential investors with the intent to defraud can be found  
16 to have violated related provisions of the securities laws"  
17 including Section 17(a). *Lorenzo* held that a defendant who  
18 disseminated a false statement, but did not make it, could be  
19 held liable under the scheme provisions. Thus, *Lorenzo* also  
20 did not answer the question of whether a defendant can be found  
21 liable under Section 17(a)(3) for having disseminated false  
22 statements made by the defendant.

23 The defendants rely on two other cases, decided prior  
24 to *Lorenzo* and *Rio Tinto*, that were decided by district judges  
25 in this circuit, neither of which addressed the specific

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1 question presented here. In *SEC v. Stoker*, 865 F.Supp.2d 457  
2 (S.D.N.Y. 2012), the defendant moved to dismiss a claim under  
3 Section 17(a)(3) for failing to allege a fraudulent or  
4 deceptive scheme distinct from the misstatements and omissions  
5 alleged in the SEC's Section 17(a)(2) claim. The district  
6 court in *Stoker* held that "a defendant may be liable under  
7 Section 17(a)(2) and Section 17(a)(3) based on allegations  
8 stemming from the same set of facts, as long as the SEC alleges  
9 that the defendants undertook a deceptive scheme or course of  
10 conduct that went beyond the misrepresentations." *Id.* at 467.  
11 Because the complaint in that case plausibly alleged a course  
12 of conduct "beyond the misrepresentations that are covered by  
13 Section 17(a)(2)," the Court found that the SEC's allegations  
14 were sufficient to state a claim under Section 17(a)(3). *Id.*  
15 at 467-68. The district court in *Stoker* was not faced with a  
16 factual situation where the defendant was sued under  
17 Section 17(a)(3) for having disseminated statements that the  
18 defendant made. *Id.* at 467.

19 In *SEC v. Kelly*, 817 F.Supp.2d 340 (S.D.N.Y. 2011),  
20 the district court dismissed the SEC's claim under  
21 Section 17(a)(2) of the Securities Act against two defendants  
22 who had not made any allegedly misleading statements. The  
23 district court decision does not address the question of  
24 whether an entity that makes misleading statements can be held  
25 liable under Section 17(a)(3) for also disseminating those

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1 statements.

2 By contrast, the SEC points to two recent district  
3 court decisions that support the conclusion that an entity that  
4 makes false and misleading statements and then disseminates  
5 those statements can be held liable under Section 17(a) (3). In  
6 *SEC v. Amah*, 21 CV 6694, 2023 WL 6383956 (S.D.N.Y. Sept. 28,  
7 2023), the district court granted summary judgment in the SEC's  
8 favor on a claim that the defendant violated Section 17(a) (3)  
9 by disseminating its own misstatements. See *Id.* at 11-14.  
10 Judge Karas concluded "Defendant can be held liable for scheme  
11 liability for directly disseminating statements as long as he  
12 possessed the requisite scienter." *Id.* at 14. The statements  
13 at issue were statements that the defendant made.

14 And in *SEC v. Terraform Labs Pte Ltd.*, 23 CV 1346,  
15 2023 WL 8944860 (S.D.N.Y. Dec. 28, 2023), the district court  
16 denied cross motions for summary judgment concluding that  
17 material facts remained in dispute regarding the SEC's claims  
18 of misstatement liability and scheme liability under  
19 Section 17(a) (3) of the Securities Act, based on the  
20 dissemination of allegedly misleading statements, among other  
21 things. The court permitted the SEC to proceed on its claim  
22 that the defendants were liable under Section 17(a) (3) when  
23 those defendants had, among other thing, allegedly "made and  
24 disseminated" "numerous false and misleading statements" to  
25 investors and the public. See *Id.*

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1                   In both *Amah* and *Terraform Labs*, the district court  
2 judges found that dissemination by the defendant of the  
3 defendant's own statements was sufficient to allege a violation  
4 under Section 17(a)(3). And although the Second Circuit Court  
5 of Appeals has not addressed a case with facts comparable to  
6 the allegations here, at this point the SEC has sufficiently  
7 stated a claim against VFI under Section 17(a)(3) for allegedly  
8 disseminating false and misleading statements to survive VFI's  
9 motion to dismiss pursuant to Federal Rule of Civil Procedure  
10 12(b)(6).

11                   The Court has considered all of the arguments raised  
12 by the parties. To the extent not specifically addressed, the  
13 arguments are either moot or without merit. For the foregoing  
14 reasons, the defendants' motion to dismiss is denied. The  
15 clerk is directed to close ECF Nos. 22 and 34.

16                   So ordered.

17                   I should add that I appreciated the briefs and the  
18 argument. I thought that the briefs were very well done. So,  
19 thank you all.

20                   Is there a scheduling order yet?

21                   MR. TAAFFE: There's not, your Honor.

22                   THE COURT: Parties should submit a Rule 26(f) report  
23 to me two weeks from today. Okay. Good afternoon, all.

24                   MR. REISNER: Thank you, your Honor.

25                   (Adjourned)